COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 017729-02**

Stephen Foreman	Employee
Highway Safety Systems	Employer
American Home Assurance/A.I.G.	Insurer

REVIEWING BOARD DECISION
(Judges McCarthy, Costigan and Horan)

APPEARANCES
John F. King, Esq., for the employee
Edward F. McGourty, Esq., for the insurer

McCARTHY, J. Stephen Foreman appeals from a decision in which an administrative judge awarded him a closed period of § 35 partial incapacity benefits; medical benefits under § 30 and attorney's fees and costs. We are satisfied that there is ample evidence in support of the judge's finding that an incapacitating industrial injury occurred. However, we agree with the employee that the decision requires a second look for further findings on average weekly wage, extent of incapacity and any penalty that may be due pursuant to § 8(1). Therefore, we reverse the decision in part and recommit the case for hearing de novo before a different administrative judge on the issues discussed below.[1]

The employee injured his lower back while working as a street line painter on May 16, 2002. While assisting a fellow employee, Mr. Foreman lifted a metal frame and suddenly felt a "pop" in his back. (Tr. 11; Dec. 5.)

The employee filed a claim for benefits and the insurer resisted payment. At conference, the judge awarded § 35 weekly partial incapacity benefits from May 17, 2002 to May 17, 2003 at the rate of $225.00 per week based on an average weekly wage of $500.00 and a $125.00 assigned earning capacity. (Dec. 2.)

[1] The judge who wrote the decision no longer serves with the department.

Dr. Gilbert Shapiro conducted an impartial examination of Mr. Foreman pursuant to § 11A on February 24, 2003. Dr. Shapiro opined that the industrial accident and injury on May 16, 2002 "produced an acute disc lesion and petrusion [sic] at L4-5 right with right [side] sciatica." (Dec. 8.) Remedial low back surgery was performed on June 6, 2002.

Three errors are identified on appeal. First, the employee contends that the administrative judge's finding of an average weekly wage of $500.00 is not supported by the record evidence. The insurer points out that an average weekly wage of $500.00 was erroneously listed in the judge's decision as a stipulation. (Insurer brief 13.)[2] The employee likewise wonders how the amount was determined. (Employee brief 3.)

"Average weekly wage" is defined in relevant part in G. L. c. 152, § 1(1), as:

> The earnings of the injured employee during the period of twelve calendar months immediately preceding the date of injury, divided by fifty-two; but if the injured employee lost more than two weeks' time during such period, the earnings for the remainder of such twelve calendar months shall be divided by the number of weeks remaining after the time so lost has been deducted. Where, by reason of the shortness of the time during which the employee has been in the employment of his employer or the nature or terms of the employment, it is impracticable to compute the average weekly wages, as above defined, regard may be had to the average weekly amount which, during the twelve months previous to the injury, was being earned by a person in the same grade employed at the same work by the same employer, or, if there is no person so employed, by a person in the same grade employed in the same class of employment and in the same district.

Absent a stipulation of the parties, the average weekly wage of an employee is a question of fact for the administrative judge. Carnute v. Stockbridge Golf Club, Inc., 17

Mass. Workers' Comp. Rep. 214, 219 (2003), citing More's Case, 3 Mass. App. Ct. 715 (1975)(rescript op.); Caldwell v. Shamrock Ent., 12 Mass. Workers' Comp. Rep. 498, 500 (1998); Cahoon v. General Welding, Inc., 10 Mass. Workers' Comp. Rep. 235, 238 (1996).

The parties agree they did not stipulate to the employee's average weekly wage.[2] In cases where there is a paucity of evidence submitted, or shortness of time during which the employee has been employed, or other reasons, the judge may use a common-sense method to determine average weekly wages. Rice's Case, 229 Mass. 325, 328 (1918); Dimeo v. Walsh Bros., Inc., 6 Mass. Workers' Comp. Rep. 208 (1992); Carnute, supra at 219. It is the judge's responsibility to provide a fair estimate of the employee's probable future earning capacity. Gunderson's Case, 423 Mass. 642, 644-645 (1996). In some cases, as the insurer points out, calculating the average weekly wage can involve more art than scientific formula, particularly in a case like this, where the work period prior to injury is minimal. (Insurer brief 13.)

The employee next argues that there is no evidence to support the finding to terminate weekly partial incapacity benefits on May 17, 2003. We agree.

In his decision, the administrative judge cited the February 24, 2003 opinion of the § 11A physician that the employee had reached a medical end result, that the [June 6, 2002] surgery essentially corrected any acute problem and that the employee has full use of his upper extremities without restrictions. The judge noted the § 11A doctor's opinion that when in certain bending positions, the employee would have between a 20 to 30 pound lifting restriction, which "*gives him a partial disability.*" (Dec. 8.)(emphasis ours).

Factual findings as to when incapacity begins or ends must be grounded in the evidence found credible by the judge. Skalski v. Phoenix Home Life, 13 Mass. Workers' Comp. Rep. 114, 116 (1999); Montero v. Raytheon Corp., 11 Mass. Workers' Comp.

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[2] Aside from the judge's decision, the record does not reflect that such a stipulation between the parties existed. A review of the hearing transcript indicates that average weekly wage was in dispute. (Tr. 6, 121.)

Rep. 596, 597 (1997). In addition, the date chosen by the judge to terminate benefits must be based on some change in the employee's medical or vocational condition. Demeritt v. Town of North Andover School Dept., 11 Mass. Workers' Comp. Rep. 630, 633 (1997).

The employee's final argument cites error in the judge's failure to address the issue of penalties pursuant to § 8(1), based on the alleged failure of the insurer to pay interest on the judge's initial conference order.[3] The issue of failure to pay interest was raised at hearing, (Dec. 3; Tr. 4-5), as well as in the employee's "Hearing Memorandum" and was argued by the parties on appeal. The judge failed to address it in the decision. Chalmers v. City of Boston, 13 Mass. Workers' Comp. Rep. 435, 436 (1999). On recommittal, the newly assigned judge must make such findings of fact as are necessary to address this issue. Chalmers, supra; citing G. L. c. 152, § 11B ("Decisions of members of the board shall set forth the issues in controversy, the decision on each and a brief statement of the grounds for each such decision"). Leonard v. Merrimack Valley Regional Transit Auth., 12 Mass. Workers' Comp. Rep. 508, 509 (1998).

We return this case to the Senior Judge for reassignment to a different administrative judge. The newly assigned judge will hold a hearing and thereafter file a decision which confronts and decides the issues discussed above. In his or her discretion,

[3] Section 8(1) provides, in relevant part:

> Any failure of an insurer to make all payments due an employee under the the terms of an order, decision, arbitrator's decision, approved lump sum or other agreement, or certified letter notifying said insurer that the employee has left work after an unsuccessful attempt to return within the time frame determined pursuant to paragraph (2) of this section within fourteen days of the insurer's receipt of such document, shall result in a penalty of two hundred dollars, payable to the employee to whom such payments were required to be paid by said document; provided, however, that such penalty shall be one thousand dollars if all such payments have not been made within forty-five days, two thousand five hundred dollars if not made within sixty days, and ten thousand dollars if not made within ninety days.

the judge may include new issues which have arisen in this case during the pendency of this appeal.

So ordered.

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William A. McCarthy
Administrative Law Judge

Filed: ***July 19, 2005***

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Patricia A. Costigan
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge